IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.433 OF 2001

Popatlal Jethabhai Shah,
age 55 years, residing at
Marwadi Chawl, Siddharth Nagar,
Kalyan, Dist.Thane. ...Appellant
(Yerawada Central Prison, Pune) (Ori.Accd.)

Versus

1.State of Maharashtra
(Through Kolshewadi Police
Station, Kalyan).

2.Sunita Vijay Ambekar,
C/o.Vijay Ambekar,
Parshuram Wadi, Jimmy Baug, ...Respondents
Kalyan, Dist.Thane (No.2-complainant)

.....

Mr.Prakash Naik for Appellant.

Mr.Y.S.Shinde, A.P.P. for Respondents.

.....

CORAM: A.M.KHANWILKAR, J.

SEPTEMBER 21, 2006.

ORAL JUDGMENT :

1. This Appeal by the accused is directed against the Judgment and Order dated May 30, 2001

passed by the 2nd Additional Sessions Judge, Kalyan in Sessions Case No.1307 of 1996. The Appellant/accused has been convicted for having committed offence punishable under Section 376(2)(f) of the Indian Penal Code, 1860 (hereinafter referred to as 'the Code') and ordered to undergo sentence of rigorous imprisonment for ten years and to pay fine of Rs.5,000/- (Rupees Five Thousand Only), in default, to suffer further rigorous imprisonment for one year.

2. In short, the prosecution case is that Sunita Vijay Ambekar (PW 2) (hereinafter referred to as 'the prosecutrix'), who was at the relevant time aged 10 years, after coming from her school on 16th November 1995 at around 12.30 p.m. happened to visit the grocery shop of the Appellant, which was near her house. The Appellant called her inside the shop. After the prosecutrix entered the shop, Appellant/accused closed the front door of the shop. The Appellant had residential premises attached to the shop on the rear side. It is stated that after closing the front door of the shop, the Appellant removed the underwear of the

prosecutrix. He then removed the chain of his pant and took out his private part. He made the prosecutrix to bend. The accused then stood behind the prosecutrix and lifted the prosecutrix up to his waist by holding the prosecutrix by stomach with both his hands. After lifting her up to his waist height, it is alleged that the accused then placed his penis on the private part of the prosecutrix and then started moving the prosecutrix back and forth and criss-cross, due to which the prosecutrix experienced pain at her private part. As a result, the prosecutrix started shouting, whereupon, the accused put the prosecutrix back on the floor and pressed her mouth. At that time, blood started oozing out from the private part of the prosecutrix. The accused immediately gave paper to the prosecutrix and told her to clean the blood stains. The accused also asked the prosecutrix to wash her underwear, which was bloodstained. As the bleeding did not stop, the accused poured pepsicola on the private part of the prosecutrix. Thereafter, accused gave Rs.3/- (Rupees Three) and toffee to the prosecutrix and threatened her not to disclose the incident to

anybody and go home and sleep. It is stated that prosecutrix, on reaching home, disclosed the incident to her sister and maternal uncle. Her maternal uncle Sopanrao Marotrao Mahangade (PW 9) immediately took the prosecutrix for medical examination to Dr.Shyam Trimbak Dhonde (PW 7). However, on disclosing that it was a case of rape, the said doctor PW 7 declined to treat the girl and asked her maternal uncle to inform the police as it was a medicolegal case. The maternal uncle (PW 9) along with the prosecutrix returned home and waited for the mother of the prosecutrix who had gone to the market as she was engaged in business of sale of vegetables. The father of the prosecutrix was away from home, as he was serving as peon in New High School at Kalyan. It is stated that the mother Pushpa Vijay Ambekar (PW 1) returned home in the evening at around 7.00 p.m. When the mother returned home, prosecutrix went in the arms of her mother and started weeping. Thereafter, she narrated the incident to her mother. The mother accordingly proceeded to the Police Station and registered the complaint (Exhibit 16). The entire episode as unfolded and disclosed by the

prosecutrix was given by the mother to the Police which was reduced into writing. After the complaint was registered, the Police Officer commenced investigation. The prosecutrix was referred to hospital for examination on the same night i.e. night between 16th and 17th November 1995. Dr.Vijaya Atul Band (PW 6) examined the patient when the patient was admitted to the Kalyan Municipal Hospital, the history of injury was given as rape. After examining the prosecutrix, Medical Officer of the Hospital issued medicolegal certificate (Exhibit 31) which reads thus :

> "Medicolegal Certificate 22.11.95 dt.1.30 P.M.
>
> This is to certify that I have examined the Pt.Kum.Sangita Vijay Ambekar, aged 10 yrs. residing at Pershuramwadi, Kadam Chawl, Sidharth Nagar, Kolsewadi came on 17.11.95 at 12.45 A.M. with H/o. Rape. (Respeatally since Diwali said by Pt.) O/e - Pallort Rs / NAD CVS P/A : Soft no any injury on body,
> Primary secondary sex character not developed.
> Axillary and pubic hairs not developed.
>
> Local examination :-
>
> No injury on Vulva, except (at abrasion below the vaginal orifice (outside) of 1/2 cm x 1 cm. Blood stains on Vulva present.

2) Labia majora labia minora is normal

1) Hymen-slightly distorted.
blood stained discharge removed from vaginal orifice as vaginal swab no swelling or injury on vulval area.

Opinion- attemption of rape."

3. The Police, in the course of investigation, visited the scene of offence and arrested the accused. Arrest panchanama was prepared in the presence of independent panchas. The police also seized the bloodstained clothes from the person of accused as recorded in the seizure panchanama. The bloodstained clothes of the prosecutrix (frock, skirt and nicker stained with blood) were also seized under panchanama. The seized articles were sent for chemical analysis. The Chemical Analyser's report would indicate that the bloodstains found on the clothes of the accused were of 'A' group which resembled the blood group of the prosecutrix. The blood group of the accused is found to be 'O'. The bloodstains found on the clothes of the prosecutrix were also of the same blood group 'A'. On the basis of material collected during investigation, the Police

proceeded to file charge-sheet against the Appellant/accused for offence under Sections 342, 376(2)(f) and 506 of the Code. The case was committed for trial to the Sessions Court. The Sessions Court framed three charges against the Appellant/accused. The Appellant pleaded not guilty. Accordingly, the prosecution examined, in all, ten witnesses and also produced and proved the relevant documents and articles such as complaint (Exhibit 16), panchanama of arrest of accused (Exhibit 20), panchanama of scene of offence (Exhibit 21), panchanama of attachment of clothes of prosecutrix (Exhibit 23), Chemical Analyser's reports (Exhibits 25, 26 and 27), medical certificates of prosecutrix (Exhibits 31 and 32), certificate regarding date of birth of prosecutrix (Exhibit 36) and panchanama (Exhibit 45). The Appellant/accused himself entered the box as defence witness No.1. On the analysis of the evidence which came on record during the trial, the Trial Court, by the impugned Judgment and Order proceeded to convict the Appellant for offence under Section 376(2)(f) of the Code. But acquitted him of offence punishable under Section 342 and

506(ii) of the Code. The Trial Court passed the following operative order :

"O R D E R

1. The accused Popatlal Jethabhai Shah is convicted for the offence punishable under Section 376(2)(f) of Indian Penal Code and sentenced to suffer R.I. for 10 years and to pay fine of Rs.5000/- in default to suffer further R.I. for One year.

2. Out of fine amount recovered amount of Rs.4000/- be paid to p.w.2 Sunita as compensation as per Section 357 of Cr.P.C. The said amount be kept in fixed deposit in bank till Sunita attains age of majority.

3. The accused is acquitted of the offence punishable under section 342 and 506(2) of Indian Penal Code.

4. The accused was in jail since 16.11.95 till 20.11.96, therefore this much period of set off u/s 428 of Cr.P.C. is given.

5. The muddemal property being worthless be destroyed after the period of appeal is over."

4. The Trial Court, in the first place, addressed itself to the fact of age of the prosecutrix on the relevant date as to whether it was below 12 years as asserted by the prosecution. On considering the evidence of mother of the

prosecutrix (PW 1), Dr.Vijaya Band (PW 6), who had examined the prosecutrix and of the Head of the School (PW 8) who proved the birth certificate and the certificate (Exhibit 36), it was concluded that there was no manner of doubt that the prosecutrix on the relevant date was about ten years of age i.e. below twelve years. Before this Court, the Appellant has not questioned the correctness of the said finding.

5. The Trial Court has then examined the relevant evidence, both ocular and documentary, to conclude that the prosecutrix was subjected to sexual intercourse on the relevant date. That finding has been reached on the basis of the evidence of mother of the prosecutrix (PW 1), prosecutrix (PW 2), Dr.Vijaya Band (PW 6), who had examined the prosecutrix, Dr.Shyam T.Dhonde (PW 7), who had also noticed that blood was oozing out from the private part of prosecutrix when she was brought for medical treatment to him by the maternal uncle of the prosecutrix. Reliance is also placed on the evidence of maternal uncle of the prosecutrix (PW 9) as also the evidence of

Panchas- Mahendra Waman Akhede (PW 4) and Rajaram Tukaram Jadhav (PW 5) who have proved the seizure of bloodstained clothes from the person of the accused as also bloodstained clothes of the prosecutrix and the bloodstained frock from the scene of offence. The Trial Court has also adverted to the Chemical Analyser's reports. Taking all these factors into account, the Trial Court has recorded finding of fact that the prosecutrix was subjected to sexual intercourse on the relevant date by the accused/Appellant herein. The Trial Court has accepted the evidence of the prosecutrix to be most natural one without there being any kind of exaggeration. The Trial Court has also found that the defence has failed to challenge the version of the prosecution witnesses on material points. Whereas, suggestion is given that the prosecutrix was deposing false as she was tutored by her mother. The Trial Court has also accepted the evidence of PW 1 as trustworthy and held that defence did not bring anything on record to disbelieve her testimony. The Trial Court has also adverted to the medical evidence including the version given by Dr.Vijaya Band (PW 6) to conclude

that the Appellant was guilty of offence under Section 376(2)(f) of the Code. The Trial Court, however, acquitted the Appellant of further two charges. The State has not challenged the said finding of the Trial Court.

6. In other words, the principal question that needs to be addressed in the present Appeal is: whether the conclusion reached by the Trial Court with regard to the finding of guilt against the Appellant for offence under Section 376(2)(f) of the Code can be sustained?

7. During the course of arguments before this Court, Counsel appearing for the Appellant made no attempt to challenge the finding of fact recorded by the Trial Court regarding the age of the prosecutrix on the relevant date to be below twelve years of age. The thrust of the argument canvassed before this Court is that even if the prosecution case established by the evidence of prosecution witnesses to the effect that the prosecutrix had gone to the shop of the accused in the afternoon after coming from the School and that, the accused

called the prosecutrix inside his shop, thereafter closed the front door of the shop, is accepted as it is, even then, the Appellant cannot be found guilty for offence under Section 376(2)(f) of the Code; but at best, be proceeded under Section 511 of the Code of one of attempt to commit rape and not of rape itself. This is the only argument canvassed before this Court on merits of the case.

8. According to the learned Counsel for the Appellant, there was no legal evidence about penetration which is the *sine qua non* for constituting offence under Section 375 and 376 of the Code. According to the Appellant, the reported injury on the private part of the prosecutrix who was examined by the doctor was possible on account of vigorous rubbing (external) of the private part of the prosecutrix or possibly, by scratching of the private part and not necessarily by penetration. It was also argued that the bloodstains noticed on the vulva by the doctor were possible also because of menstruation and not necessarily on account of penetration, which position is accepted by the doctor (PW 6) in her

evidence. It was contended that on fair reading of the evidence of Doctor (PW 6), it can be safely concluded that in her evidence, the doctor was not certain that the injury noticed on the private part of the prosecutrix was only because of penetration and not possible in any other manner. It was submitted that the evidence of the prosecutrix nowhere mentions that there was penetration during the activity. However, that assertion has come on record only pursuant to the Court question put to the prosecutrix while the prosecutrix was under cross-examination. This assertion was clearly an improvement and will have to be discarded. In that case, there was no evidence of the prosecutrix herself on the factum of penetration. The substance of the argument on behalf of the Appellant was that the evidence on record fell short to establish the fact that the injury caused to the private part was necessarily on account of penetration. In such a case, the accused should be given benefit of doubt and if not a case for acquittal, would, at best, be a case for offence under Section 511 of the Code, of one of attempt to commit rape.

9. Counsel appearing for the parties have taken me through the entire evidence in the context of the submissions made on behalf of the Appellant as noted earlier.

10. The argument canvassed on behalf of the Appellant seems to be attractive but is devoid of substance. On careful analysis of the evidence, to wit, of prosecutrix (PW 2), who has spoken about the incident; maternal uncle of the prosecutrix (PW 9) to whom the prosecutrix had disclosed about the incident on reaching home; Dr.Shyam T.Dhonde (PW 7) to whose clinic, the prosecutrix was taken for medical treatment by the maternal uncle (PW 9); mother of the prosecutrix (PW 1) who was told about the entire incident by the prosecutrix herself after she had reached home in the evening; Dr.Vijaya Band (PW 6) who was attached to Kalyan Municipal Hospital, where the prosecutrix was taken for medical treatment; and more so, the documentary evidence in the shape of medical certificate (Exhibit 31) issued by the Hospital describing the nature of injury on the private part

of the prosecutrix coupled with the seizure of bloodstained clothes from the person of the accused, which blood group resembles the blood group of the prosecutrix as well as the bloodstained clothes seized from the prosecutrix. All this evidence, either read in isolation or together, leave no manner of doubt that the prosecution has established beyond doubt that it was a case covered by the definition of rape, the factum of penetration has been not only spoken by the prosecutrix herself but is also established from the medical evidence. This view taken by the Trial Court is unexceptionable. It is not possible

to take any other view on the basis of the evidence which has come on record.

11. For the time being, even if we were to keep the oral evidence of prosecutrix aside, as mentioned earlier, medicolegal certificate (Exhibit 31) clearly indicates that the patient was admitted in the Hospital with history of rape. The Certificate notes that the primary secondary sex character of the prosecutrix was not developed.

The axillary and pubic hairs were also not developed. The prosecutrix was of tender age at the relevant time, about 10 years. On local examination, no doubt, no injury was noticed on vulva, but it was clearly noticed that abrasion below vaginal orifice (outside) of 1/2 cm/1 cm was noticed. It was also noticed that blood stains on vulva were present. Although the labia majora labia minora were found to be normal, the hymen was noticed to be slightly distorted. It is noticed that bloodstained discharge was present on the vaginal orifice, which was removed. The doctor has then noted that no swelling or injury on vulva area was found and on that basis, proceeded to opine that it was attempt of rape. For the present, we will ignore the final opinion recorded by the doctor, one of attempt of rape. Inspite of such opinion, the Court is obliged to consider the efficacy of the other notings made and the medical certificate to ascertain as to whether it is possible to take the view that it was a case of slightest of penetration or otherwise. The fact that abrasion below vaginal orifice (outside) of 1/2 cm/1 cm, bloodstains on vulva was present,

hymen was found to be in slight distorted position and blood stains were found on vaginal orifice, leave no manner of doubt that it was a case of slight penetration. It is well established position that even slightest penetration is sufficient to constitute offence under Section 376 of the Code.

12. The medicolegal certificate has been proved by Dr.Vijaya Band (PW 6). In her evidence, she has spoken about the fact that the patient was admitted with history of rape and the contents of the certificate have been proved by her in her evidence. The cross-examination of PW 6 was directed towards the point that it was a case of attempt of rape and which opinion was recorded by the Doctor in the medical certificate on the basis of the history of rape given by the patient. The cross-examination was also directed to elicit from this witness that menstrual period can start even at the age of 10/12 years to which this witness has answered that, that is in rare cases. Witness has then deposed that in case of menstruation, there may occur bleeding in private part. It is

suggested to this witness that a female living in life of unhygienic condition may have itching on private parts and scratching by nails may cause the injuries. The witness has accepted in the cross that the abrasion injury noticed on the private part of the prosecutrix was possible by scratching. She has admitted that she did not examine the nappings of the nails.

13. The theory of bloodstains found on the private part of the prosecutrix on account of menstruation, will have to be answered against defence for more than one reason. In the first place, the medical evidence establishes the fact that the prosecutrix was hardly aged 10 years at the relevant time. On medical examination, the primary and secondary sex characters were seen to be not developed. Similarly, axillary pubic hairs were not developed. In such a case, the contention that the prosecutrix had menstrual period at the relevant time, is stretching the argument too far. Dr.Vijaya Band (PW 6) in her evidence has clearly stated that menstruation at the age of 10/12 years is in rare cases. The defence has not been able to

establish any material beyond that. Moreover, what is overlooked is that in the physical examination, it has been noticed that the hymen was slightly distorted. That has no causal connection with menstruation, but the only possibility of distortion of hymen is on account of penetration. The Trial Court has also rightly noticed that no case, much less, suggestion has been put to Dr.Vijaya Band (PW 6) that bleeding from private part continued for some time. If it was a case of menstrual period, obviously the bleeding would have continued. What is relevant to note is that specific question was put to PW 6 as to when the patient had last menstruation period, to which, she answered that there is no history of menstruation. The next question put to this witness was whether bleeding in the vaginal orifice can be due to menstruation also, to which question, she has replied in the affirmative, but has clearly denied that possibility in the present case. She has asserted that in the present case, it was a case of bleeding. The witness was then read over quotation from Dr.Modi’s Medical Jurisprudence to suggest that the bleeding was possible by menstruation.

The nature of bleeding of private part of the prosecutrix was possible on account of menstruation and that menstruation was possible to be induced by sexual intercourse. This suggestion clearly overlooks that it presupposes that at the tender age of ten years, ordinarily, there is no possibility of menstruation. But it can be induced by sexual intercourse. Even on critical analysis of evidence of Dr.Vijaya (PW 6), I have no hesitation in taking the view that the attempt of the defence to persuade the Court that the nature of injury found on the private part of the prosecutrix was on account of act other than penetration, to say the least, would be traversity of the notings made during the physical examination of the doctor. The nature of injuries are such that there is no manner of doubt that it was possible only on account of penetration. There is no ambiguity in the version of Dr.Vijaya Band (PW 6) on the factum of penetration. Interestingly, in the cross-examination of Dr.Vijaya Band (PW 6), an unsuccessful attempt is made on behalf of the defence that the injury, particularly, distortion of hymen, noticed on the private part of the

prosecutrix was possible due to masturbation. Dr.Vijaya Band (PW 6) has accepted that hymen can be distorted by vigorously rubbing private part, at the same time, has answered categorically that there were no sign of vigorous rubbing. Thus understood, from the medical evidence, which has come on record, both the possibilities for cause of bleeding from private part of the prosecutrix sought to be suggested by the defence are ruled out. The first possibility suggested is on account of vigorously rubbing the private part externally or scratching and not penetration. The second possibility was on account of bleeding on account of menstruation. Both these possibilities are ruled out. A priori, there is no manner of doubt that the nature of injury caused on the private part of the prosecutrix is ascribable to penetration. It does not matter whether the penetration is deep or slightest. All that is required to bring home the guilt for offence of rape is to establish slightest penetration.

14. In this case, we have the evidence of

prosecutrix (PW 2). In the examination-in-chief, she has spoken about the background in which the incident has happened. The material evidence given by her reads thus :

> "He came to me and had removed my underwear. He opened the chain of his pant. He has taken out his penis and touched it to my backside. He first had rotated his hands over my private parts. he caught hold by his hands at my stomach, bent me and pushed up and down. There was bleeding from my hole."

15. Placing reliance on this evidence, it was argued on behalf of the Appellant that there is absolutely no reference of the fact of penetration or insertion of penis in the private part of the prosecutrix and as the prosecutrix has not spoken about the said fact, the offence of rape is not made out. Indeed, the prosecutrix has not uttered the magic words penetration or insertion. However, the evidence of the prosecutrix (PW 2) will have to be read as a whole. When the prosecutrix was being cross-examined, she has replied as follows :

> "The bleeding from my hole was on the day of incident and thereafter for a day or

two. The bleeding was even from the front side of my private part. It is not true that because of scratching the private parts, the bleeding occurred. It is not correct that I have given my clothes and shown the place of occurrence."

. At this juncture, the Trial Judge intervened and put certain questions to the prosecutrix. The questions posed to the prosecutrix and answers given, read thus:

"Court Question:

Ques. Whether the bleeding was from the back hole or the front hole i.e. from the place of toilet or urinal?

Ans: It was from urinal.

Ques. You are saying that you pressed by his penis from backside. How this has happened?

Ans. By holding my stomach, he lifted me up. I was completely bend and by inserting his penis in my urinal, he pushed me up and down and therefore, it was bleeding from there."

. In no uncertain terms, the prosecutrix has stated that the accused had inserted his penis in her private part. This evidence is, by itself, sufficient to proceed against the accused.

16. To get over this position, Counsel for the Appellant would contend that the version given by the prosecutrix pursuant to the question put by the Court is clearly an improvement and will have to be discarded. It was contended that the case of penetration or insertion of penis is not mentioned in the examination-in-chief or for that matter, in the complaint (Exhibit 16). I find no substance in this submission. In my opinion, the prosecutrix (PW 2) has clearly deposed about the material facts on the basis of which, she has made out a case of penetration. She has stated in the examination-in-chief that the accused took out his penis and touched it from the backside. First the accused rotated his hands on her private part. Thereafter, he caught hold the prosecutrix by his hands holding at her stomach when the prosecutrix was in bent position and then started the activity of pushing up and down, as a result of which, there was bleeding from the private part. It is not possible to take the view that these facts do not indicate case of penetration. Even in the complaint as lodged, it is clearly mentioned that

the accused first removed his pant chain and took out his penis. He then made the prosecutrix bend and stood behind her. He then placed his both hands below the stomach and lifted the prosecutrix up to his waist. He then from behind placed his penis on the private part of the prosecutrix and pressed her by both hands and started moving her vigorously back and forth and criss-cross, due to which, prosecutrix felt pain at her private part and started shouting. As she started shouting, the accused put her back on the floor and pressed her mouth. Immediately blood started oozing out from her private part. With these facts on record, it leaves no manner of doubt that it was a case of penetration and nothing else. It will have to be remembered that the prosecutrix was hardly of ten years of age at the relevant time. Whereas, the accused was a fully grown up and robust man of about 55 years.

17. Reverting to the Court questions referred to above, it is obvious that as the Presiding Judge wanted to ascertain the truth and for the cause of justice, invoked his powers under Section 165 of

the Indian Evidence Act, 1872 - to put questions to the prosecutrix (PW 2) to elicit the truth so as to leave no manner of doubt. In response to the questions put by the Court, the prosecutrix explained the events as unfolded resulting into bleeding from her private part. She has categorically asserted that accused had inserted his penis in her private part. The accused was given opportunity to cross examine the prosecutrix in the context of the answers given by her pursuant to the Court questions. The only case put to the prosecutrix (PW 2) in the said cross-examination is that she was deposing falsely. With such kind of evidence on record, there can be no manner of doubt that the prosecution has established the factum of penetration beyond doubt. Thus constituting offence under Section 376 of the Code. It is well established that the powers of the Presiding Judge of the Trial Court are unbridled. It is the bounden duty of the Judge to take active part in the trial to elicit the truth. The Judge can put any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the

production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question. This is precisely what has been done by the Trial Judge in the present case, so that, the evidence is not obscure but clear on the relevant point. The role of the Judge trying a criminal case, has been noticed in the decision of the Apex Court in the case of **Ram Chander vs. State of Haryana reported in (1981) 3 SCC 191**. It will be useful to reproduce relevant portion of the said decision, which reads thus :

> "What is the true role of a judge trying a criminal case? Is he to assume the role of a referee in a football match or an umpire in a cricket match, occasionally answering, as Pollock and Maitland point out, the question 'How is that', or, is he to, in the words of Lord Denning 'drop the mantle of a judge and assume the robe of an advocate'? Is he to be a spectator or a participant at the trial? Is passivity or activity to mark his attitude? If he desires to question any of the witnesses, how far can be go? Can he put on the gloves and 'have a go' at the witness who he suspects is lying or is he to be soft and suave? These are some of the

questions which we are compelled to ask ourselves in this appeal on account of the manner in which the judge who tried the case put questions to some of the witnesses.

2. The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past:

> Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses,. Indeed the right given to a judge is so wide that he may, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) of the Code of Criminal Procedure enables the court to send for

> the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the Committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial.

3. With such wide powers, the court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must, of course,. not assume the role of a prosecutor in putting questions. The functions of the counsel, particularly those of the Public Prosecutor, are not to be usurped by the judge, by descending into the arena, as it were. Any questions put by the judge must be so as not to frighten, coerce, confuse or intimidate the witnesses. The danger inherent in a judge adopting a must too stern an attitude towards witnesses has been explained by Lord Justice Birkett :

> People accustomed to the procedure of the court are likely to be overawed or frightened, or confused, or distressed when under the ordeal of prolonged questioning from the presiding judge. Moreover, when the questioning takes on a sarcastic or ironic tone as it is apt to do, or when it takes on a hostile note as is sometimes almost inevitable, the danger is not only that witnesses will be unable to present the evidence as they may wish, but the parties may begin to think, quite wrongly it may be, that the judge is not holding the scales of justice quite eventually.

In Jones v. National Goal Board Lord

Justice Denning observed:

> The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can asses their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle or the judge and assumes the role of an advocate; and the change does not become him well.

We may go further than Lord Denning and say that it is the duty of a judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, or any witness, or of the parties, about any fact, relevant or irrelevant" (Section 165, Evidence Act). But this he must do, without unduly trespassing upon the functions of the Public Prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The judge, 'like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and (sic the)

old'." (emphasis supplied)

18. There is another decision on the powers and duty of the trial Judge in the case of **State of Rajasthan vs. Ani alias Hanif & Ors. reported in (1997) 6 SCC 162.** It will be useful to reproduce paras 11 and 12 of this decision, which read thus:

> "11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.
>
> 12. Reticence may be good in any circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a

> bout or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put question to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence-collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised." (emphasis supplied)

19. In my opinion, the Trial Court has rightly invoked the power available under Section 165 of the Indian Evidence Act, 1872 r/w Section 311 of the Criminal Procedure Code - by putting questions to the prosecution witnesses at the appropriate time to elicit the truth. The answers given pursuant to the said questions by the prosecutrix (PW 2), if I may say so, has cleared the obscurity in the evidence, if at all there was any, on the

material point.

20. The argument canvassed on behalf of the Appellant that the assertion made in this part of the evidence of the prosecutrix (PW 2) is an improvement and be discarded, does not commend to me. I have already dealt with this aspect in the earlier part of this decision to hold that going by the version given by the prosecutrix in the examination-in-chief as it is, relevant ingredient of offence has been made out. Similarly, even the facts narrated in the complaint which is reduced into writing also reveal the ingredients of offence under Section 376 of the Code. Viewed thus, it was not a case of improvisation of evidence on material fact, so as to discard that part of the evidence. As is mentioned earlier, as the Court had ample power to put questions to unravel the truth; in the present case, by exercise of that power, the obscurity in the evidence, if at all, there was any, has been cleared. The argument of the Appellant that the fact of penetration was improvisation, is devoid of merits.

21. The matter can be viewed from another angle. Going by the Scheme of Section 137 and 138 of the Indian Evidence Act, 1872, it is obvious that the examination of witness by the party who calls him, has to first examine the witness, which part of evidence is known as examination-in-chief. The adverse party is then given an opportunity to cross-examine that witness and that part of the evidence is known as cross-examination. The law requires that the examination and cross-examination must relate to relevant facts. Indeed, the cross-examination need not be confined to the facts on which the witness has testified in his examination-in-chief. In the event, the party who has examined his witness, intends to explain certain matters referred to in the cross-examination or if new matter has come in the cross-examination, can proceed to re-examine his witness - which part of the evidence is known as re-examination. If new matter comes during this evidence, the adverse party is given opportunity to further cross-examine the witness on that matter. In that sense, the evidence which comes on record pursuant to the question put by the Court in

exercise of powers under Section 165 of the Evidence Act, is outside the Scheme for recording of evidence under Section 137 and 138 of the Evidence Act. It is a *sui generis* mechanism to be invoked by the Judge in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; etc. That part of evidence can neither be described as examination-in-chief, cross-examination or re-examination as such, within the meaning of Section 137 and 138 of the Evidence Act. The evidence which comes before the Court in the form of questions put by the Court under Section 165 of the Evidence Act, nevertheless, is a piece of admissible evidence. Indeed, the adverse party against whom the witness has given evidence pursuant to the Court question is entitled to cross-examine on matter referred to in the answer given in reply to any such question. Thus understood, I am unable to fathom the contention that the version given by the prosecutrix (PW 2) pursuant to the Court questions asked in exercise

of powers under Section 165 of the Evidence Act, would amount to improvisation when juxta posed with the evidence in the examination-in-chief of that witness. Suffice it to observe, therefore, that the evidence so given pursuant to Court questions will have to be tested on its own merits. In the present case, the defence has not challenged the version so given except to put suggestion in the cross that the prosecutrix was deposing falsely.

22. On analysing the evidence which has come on record on the factum as to injury caused due to penetration or otherwise the medical evidence as well as the evidence of prosecutrix (PW 2) who has spoken about the same; as also the version of other prosecution witnesses and the contemporaneous record of complaint of rape and history of injury given in the hospital while admitting prosecutrix (PW 2) as one of rape, clearly brings home the guilt.

23. I am fortified in my view on the basis of the legal position expounded in several decisions of the Apex Court. In the case of **Prithi Chand vs.**

State of Himachal Pradesh reported in (1989) 1 SCC 432, dealing with the similar contention, the Court proceeded to analyse the medical evidence. In Para 5 of this decision, it was noticed that Doctor opined that the accused was well nourished and well developed for his age and was fit to indulge in sexual intercourse. Insofar as the prosecutrix was concerned, having regard to her age and the fact that her vagina admitted one finger with difficulty, the doctor opined that it was not possible to believe that there was penetration. The Apex Court rejected this theory by observing that the argument overlooks the fact that in the absence of penetration, there would not be absence of hymen with the edges torn and profuse bleeding from the vagina staining the salwar. The Court went on to observe that merely because the doctor found that vagina admitted one finger with difficulty, it cannot be inferred that there was no penetration. The principle applied in the said case by the Apex Court is clearly attracted in the present case, where the injury noted on the private part of the prosecutrix is noted in the medicolegal certificate, coupled with the recovery of

bloodstained clothes from the person of the accused which bloodstains correspond to the blood group of the prosecutrix; as well as seizure of bloodstained clothes of the prosecutrix, would support the prosecution case that the prosecutrix had bleeding from her private part and belies the opinion noted by the doctor that it was a case of attempt of rape. The prosecution evidence to that extent will have to be ignored on this reasoning.

24. In the case of **State of H.P. vs. Gian Chand reported in (2001) 6 SCC 71**, the Court has reiterated the established legal position that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by the medical evidence and other circumstances such as the report of the chemical examination etc., if the same is found to be natural, trustworthy and worth being relied on. The Court has also adverted to the earlier decisions of the same Court, wherein, it is mentioned that if evidence of prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. It is

further held that if for some reason, the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. Accordingly, if the version given by the prosecutrix is natural, trustworthy and worth being relied on, no corroboration need be insisted upon. Accordingly, in Paragraph 15 of this decision, the Court proceeded to observe as follows:

> "15. .... The prosecutrix has spoken of "penetration" in her statement. The discovery of spermatozoa in the private parts of the victim is not a must to establish penetration. There are several factors which may negative the presence of spermatozoa (see Narayanamma v. State of Karnataka). Slightest penetration of penis into vagina without rupturing the hymen would constitute rape *(see Madan* Gopal Kakkad v. Naval Dubey). The suggestion made in the cross-examination of Dr.Mudita Gupta that injury of the nature found on hymen of the prosecutrix could be caused by a fall does not lead us anywhere. firstly, no such suggestion was given to the prosecutrix or her mother during cross-examination. Secondly, why would the girl or her mother implicate the accused, charging him with rape, if the injury was caused by a fall? There is

> nothing to draw such an inference, not even a suggestion, to be found on record. The answer to the suggestion made to Dr.Gupta cannot discredit the prosecution case in the absence of any other material to support the suggestion. So is the case with the absence of any other material to support the suggestion. So is the case with the absence of external marks of violence on the body of the victim. In case of children who are incapable of offering any resistance external marks of violence may not be found. *(See Modi's Medical jurisprudence, 22nd Edn., p.502.)* It is true that marks of external injury have not been found on the person of the accused but that by itself does not negate the prosecution case. Modi has opined (see Modi, ibid, p.509) that even in the case of a child victim, being ravished by a grown-up person it is not necessary that there should always be marks of injuries on the penis in such cases. Further, it is to be noted that about two days had elapsed between the time of the incident and medical examination of the accused
>
> within which time minor injuries, even if caused, might have healed."
>
> (emphasis supplied)

25. We would then turn to the decision in the case of **Madan Gopal Kakkad vs. Naval Dubey & Anr. reported in (1992) 3 SCC 204**. In Para 23 of this decision, it is observed thus:

> "23. There are a series of decisions to the effect that even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction can be

> safely recorded, provided the evidence of the victim does not suffer from any basis infirmity, and the 'probabilities factor' does not render it unworthy of credence, and that as a general rule corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. Vide (1) Rameshwar v. State of Rajasthan, (2) Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (3) Krishnan Lal v. State of Haryana."

26. It is well established that the corroboration of the version given by the prosecutrix need not be insisted upon. Even in the case of **Madan Gopal Kakkad vs. Naval Dubey & Anr. (supra)**, similar argument was raised that it was at best, a case of attempt to rape, which has been negatived by the Apex Court inspite of the opinion of the doctor that it was a case of attempt to rape. On analysing the evidence in that case, the Court rejected the argument and held that the offence was nothing short of rape. The Apex Court discarded the medical opinion as to the nature of the offence committed by the accused. The Apex Court has highlighted that the purpose of the opinion is only to enlighten the Court on the technical aspect of the case. The Court referred

to authorities on the subject and have concluded thus :

> "34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. the expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those material after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.
>
> 35. Nariman, J. in *Queen v. Ahmed Ally* while expressing his view on medical evidence has observed as follows:
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> > "The evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion."
>
> 36. Fazal Ali, J. in *Pratap Misra v. State of Orissa* has stated thus:
>
> > "...[I]t is well settled that the medical jurisprudence is not an exact science and it is

> indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused... as to the exact time when the appellants may have had sexual intercourse with the prosecutrix."

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by *Modi in Medical Jurisprudence and Toxicology* (Twenty-first Edition) at page 369 which reads thus:

> "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not given his opinion that no rape had been committed. *Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual*

> *activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."* (emphasis supplied)

38. In *Parikh's Textbook of Medical Jurisprudence and Toxicology*, the following passage is found:

> *"Sexual intercourse.*-In law, this terms is held to mean the slightest degree of penetration of the vulva, by the penis with or without emission of semen. It is therefore quit possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In *Encyclopedia of Crime and Justice (Vol.4) at page 1356*, it is stated:

> "...[E]ven slight penetration is sufficient and emission is unnecessary."

40. In *Halsbury's Statutes of England and Wales*, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of Section 44 of the Sexual Offences Act, 1956. Vide (1) *R. v. Hughes;* (2) *R. v. Lines* and *R. v. Nicholls.*

41. See also *Harris's Criminal Law*, (Twenty-second Edition) at page 465.

42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of *Penal Code of California* reads thus :

> "*Rape; essentials-Penetration*

> *sufficient.-* The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

43. The First Explanation to Section 375 of Indian Penal Code which defines 'Rape' reads thus:

> *"Explanation.-* Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

44. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) *Natha v. Emperor*; (2) *Abdul Majid v. Emperor*; (3) *Mst.Jantan v. Emperor*; (4) *Ghanashyam Misra v. State;* (5) *Das Bernard v. State.* In *re Anthony* it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In *Gour's The Penal Law of India*, 6th Edn. 1955 (Vol.II), page 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape."

27. In this decision, the Apex Court has quoted with approval, observations in the Gour's

The Penal Law of India that even vulva penetration is sufficient for a conviction of rape. It is held that even slightest penetration is sufficient to make out an offence of rape. Even in the present case, from the evidence, it is more than obvious that there was penetration. The injuries noticed in the medicolegal certificate and proved in evidence and the fact that there was profused bleeding from the private part of the prosecutrix, all this goes to show beyond doubt that it was a case of penetration.

28. In the case of **State of U.P. vs. Babul Nath reported in (1994) 6 SCC 29**, the Court was called upon to consider similar argument of penetration. The injury noticed on external examination by the doctor was that hymen was completely torn and there was laceration on all sides of vagina. There was fresh bleeding. On internal examination, the doctor noticed that a finger could easily be inserted in her private part and bloodstained discharge was coming out. The doctor opined that the girl was subjected to sexual intercourse. The Apex Court examined the matter by

first referring to the medical evidence to conclude that the prosecutrix was subjected to sexual assault without which she would not have sustained injuries of the nature found on the private part by the doctor who examined her. It will be useful to reproduce observations of the Apex Court in Paragraphs 7 and 8 of the said decision, which read thus :

> 7. In order to see whether there was sexual assault on the girl we may have a look to the medical evidence. Doctor Smt Santosh Kohali deposed that the victim girl was brought to the hospital in a semi-conscious state and her general condition was poor. On external examination of the girl the doctor found that the hymen was completely torn and there was laceration on all sides of vagina. The doctor noticed that there was fresh bleeding in her private part. On internal examination the doctor found that a finger could easily be inserted in her private part and bloodstained discharge was coming out. Thus from the medical evidence it is clear that the girl was not only subjected to an indecent assault but there was sexual activity and the girl was subjected to sexual assault, otherwise the doctor would not have found the hymen completely torn, laceration on all sides of the vagina and fresh bleeding. There is yet another factor which goes to show that the girl was subjected to sexual intercourse. According to the evidence of lady doctor a finger could be easily inserted inside her private part which

otherwise was not possible in the case of a child aged 5 years because according to the *Medical Jurisprudence* by Modi, 21st Edn., p.376, in a girl under 14 years of age the vaginal orifice is usually so small that it will hardly allow the passage of the little finger through her hymen. In the present case if the girl aged 5 years was not subjected to sexual intercourse the finger could not have been easily inserted in her private part as observed by the lady doctor. The High Court totally ignored this aspect of the matter also and on wrong premises came to the conclusion that the victim was subjected to indecent assault only.

8. It may here be noticed that Section 375 of the IPC defines rape and the Explanation to Section 375 reads as follows:

> *"Explanation.-* Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would

> be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

29. There is yet another decision of the Apex Court in the case of **Ranjit Hazarika vs. State of Assam reported in (1998) 8 SCC 635**. The Court rejected the argument of the accused that the medical evidence belies the testimony of the prosecutrix and her parents. The Court went on to observe that mere fact that no injury was found on the private part and the hymen was found to be intact, does not belie the statement of the prosecutrix. In that case also, the prosecutrix was around 14 years of age at the time of incident. She was subjected to sexual intercourse in a standing posture, which circumstance itself, observed Supreme Court, indicates absence of any injury on her private part. The Court went on to primarily rely on the statement of the prosecutrix

who had spoken about the fact that she was subjected to sexual intercourse as her statement remained unchallenged in the cross-examination. Even in the present case, the evidence of prosecutrix (PW 2) on material points has gone unchallenged. The relevant portion of the discussion in Paragraphs 5 and 6 of the Judgment is reproduced thus:

> "5. .... To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons".
>
> 6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she

would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In *State of Punjab v. Gurmit Singh* to which one of us (Anand, J.) was a party, while dealing with this aspect observed : (SCC pp.395-96, para 8)

> "The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for

corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Whey should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding.Corroborative

> evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

We are in agreement with the aforesaid view."

. In Paragraph 5, the Court has noted the factors to be weighed while evaluating the evidence of the prosecutrix. It is observed that nothing

was brought on record to doubt the veracity or to suggest as to why the prosecutrix would falsely implicate the accused and put her own reputation at stake. In such a case, inspite of the opinion of the doctor that no rape appeared to have been committed, which opinion was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix, came to be discarded and instead, reliance was primarily placed on the evidence of the prosecutrix herself to proceed against the accused, as it inspired confidence. The Court has observed that the prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted, unless corroborated.

30. We shall now turn to the recent Judgment of the Apex Court in the case of **Aman Kumar & Anr. vs. State of Haryana reported in (2004) 4 SCC 379**. This Judgment has analysed the legal position as to when offence of rape is complete, as can be discerned from Paragraphs 5 to 8. The same read thus:

"5. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. however, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffice.

6. The offence of rape occurs in Chapter XVI IPC. It is an offence affecting the human body. In that chapter, there is a separate heading for "sexual offences", which encompass Sections 375, 376, 376-A, 376-B, 376-C and 376-D. "Rape" is defined in Section 375. Section 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act i.e. Sections 376-A, 376-B, 376-C and 376-D. The fast sweeping changes introduced reflect the legislative intend to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is "the ravishment of a woman, without her consent, by force, fear or fraud", or as "the carnal knowledge of a woman by force against her will". "Rape or raptus" is when a man hath carnal knowledge of a woman by force and against her will (Co Litt 123 b); or, as expressed more fully, "rape is the carnal knowledge of any

woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will". (Hale PC 628) The essential words in an indictment for rape are *rapuit* and *carnaliter cognovit; but carnaliter cognovit*, nor any other circumlocution without the word *rapuit*, are not sufficient in a legal sense to express rape. [1 Hen.6, la. 9 Edw.4, 26 a (Hale PC 6280] In the crime of rape, "carnal knowledge" means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation. *(Stephen's Criminal Law,* 9th Edn., p.262) In *Encyclopaedia of Crime and Justice* (Vol.4. p.1356), it is stated " ... even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (4th Edn.), Vol.12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation, with violence, of the private person of a woman, an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (*see Joseph Lines,* IC&K 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. *[See S.P.Kohli (Dr) v.High Court of Punjab and Haryana.]* In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against

penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. the rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is viable. This variation, sometimes permits penetration without injury. this is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by

the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. the depth of penetration is immaterial in an offence punishable under Section 376 IPC.

8. The plea relating to applicability of Section 376 read with Section 511 IPC needs careful consideration. In every crime, there is first, intention to commit, secondly, preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded."

31. It will be useful to refer to another

recent decision of the Apex Court in the case of **State of Chhattisgarh vs. DERHA reported in (2004) 9 SCC 699.** In this case, the Court first proceeded to analyse the medical evidence and proceeded to hold that the nature of injuries clearly establishes that the prosecutrix was subjected to sexual intercourse. Even in that case, the only suggestion given on behalf of the defence was that he was falsely implicated on account of some enmity between the parents of the accused and those of the victim, rejecting that claim and more particularly, having regard to the medical evidence about the injury suffered by the prosecutrix and the evidence of the prosecutrix, the Court proceeded to find the accused guilty of the offence of rape under Section 376(2)(f) of the Code. It will be apposite to advert to Para 6 of the Judgment, which reads thus:

> "6. Having heard learned counsel for the parties and perused the records, we are satisfied that the High Court has erred in coming to the conclusion that the accused was not guilty of the offence charged. We first notice from the evidence of PW 3, the doctor that the injuries suffered by PW 2 could not have been self-inflicted. There was blood on her private parts, the hymen was torn and medial side of the

labia minora was inflamed. This was even after 4 days of the incident. The doctor in specific terms had stated that the victim is not habituated to sexual intercourse. The mere fact that to a suggestion made in the cross-examination that such injuries could be suffered by the victim by falling on a hard and blunt substance, by itself, in our opinion, would not suffice to reject the evidence of PW 2 who had no enmity whatsoever to implicate the respondent-accused. The suggestion which has come in the form of Section 313 CrPC statement merely says that there was some enmity between the parents of the accused and those of the victim. Neither the nature of enmity nor gravity of the same has been stated, therefore, that explanation would be of no assistance to the accused to establish the fact that he has been falsely implicated. the law is well settled in regard to the evidence of a prosecutrix. It is now well established that if the court is satisfied from the evidence of the victim a conviction can be solely based on such evidence without looking for further corroboration. Same can be done because the prosecutrix is no more treated as an accomplice in the crime. In the instance case the factum of injury suffered by PW 2 and the opinion of the doctor that such injury could have been caused by sexual intercourse and the victim having not been habituated to earlier sexual intercourse itself goes to show that the injury suffered by the victim was one that could have ben causes only by an act of rape as alleged by the prosecution. Even in identification of the accused by the victim we have no doubt because he was known to the victim."

32. Applying the legal principle expounded in

the aforesaid decisions to the case on hand, I have no hesitation in taking the view that the Appeal is devoid of merits. The opinion recorded by the Trial Court is not only a possible view, but the only conclusion that ought to be reached in the fact situation of the present case. The evidence of prosecutrix (PW 2) can be safely relied as natural and trustworthy. The prosecutrix has in fact spoken about the material aspects to establish the offence of rape committed by the Appellant/accused. The possibility of the version given by the prosecutrix is fortified from the medical evidence. Indeed, there are other prosecution witnesses including the circumstance of recovery of bloodstained clothes having blood group of prosecutrix, would speak for itself. Applying the principle of *res ipsa loquitur*, the prosecution has established the guilt of the Appellant beyond reasonable doubt. The defence of the Appellant is devoid of merits. There is no challenge in the entire evidence regarding seizure of bloodstained clothes from the person of the Appellant/accused and of the prosecutrix which were worn by her at the relevant time having bloodstained marks.

Accordingly, this Appeal should fail.

33. Counsel for the Appellant would then contend that in view of the mitigating circumstances, the Court may consider of reducing the sentence to one already undergone by the Appellant in relation to the offence in question. It is submitted that the Appellant is already 65 years of age as of now. He has undergone about six years of sentence so far. While he was on bail for a short period during the trial, no adverse report has been given against the Appellant. The Appellant's wife has expired long back. He has to look after one handicap daughter. Accordingly, it is submitted that the Appellant be shown leniency and at least, the sentence period be reduced to one already undergone.

34. To buttress this submission, reliance is placed on the decision of the Single Judge of this Court in the case of **Arun s/o. Bhauraoji Nimbalkar vs. State of Maharashtra reported in 2005 All MR (Cri.) 132.** Even in that case, the conviction was for offence under Section 376(2)(f) of the Code.

Relying on the observations made in Para 9, it is contended that the Court reduced the quantum of sentence to five years instead of minimum sentence of ten years specified by the Statute on the ground that the incident in question had taken place about 17 years back and the proceedings were lingering in Court for over 17 years. It is submitted that even in the present case, the offence in question took place on 16th November 1995 and almost 11 years have elapsed. The argument seems to be attractive, but I am in agreement with the submission canvassed by the A.P.P. that for the nature of offence committed by the Appellant, no leniency ought to be shown and the Court should come down on such accused with heavy hand. The facts which are pressed into service as mitigating circumstances, neither can be said to be adequate or special reasons for exercising discretion of the Court in terms of power under Section 376 of the Code. The offence was against a girl of tender age. She was ravished when she was of hardly 10 years of age. That incident has had cascading effect on the emotional and social development of the prosecutrix and her family members. It has come in the

evidence that after the incident, the prosecutrix stopped attending the School. At that time, she was in third standard. Borrowing the words of the Supreme Court-that accepting the argument of the Appellant that the incident in question has occurred almost eleven years back and the Appellant has already undergone six years of imprisonment to be the basis to show leniency in favour of the Appellant, would be nothing short of fanciful reasons. Those reasons cannot be said to be adequate and for that matter, special reason, which is the requirement under Section 376 proviso to show leniency to the accused. In the case of **State of M.P. vs. Munna Choubey & Anr. reported in (2005) 2 SCC 710**, the High Court had reduced the sentence of imprisonment of seven years rigorous imprisonment imposed by the Trial Court to period already undergone (three years and six months in the case of one accused and two months in the case of other) on the ground of lapse of time and on the ground that accused belonged to rural areas, which were commented upon as fanciful reasons, not germane to the requirements of 2nd proviso to Section 376 of the Code. The Apex Court has

re-stated the legal position about imposition of appropriate sentence with particular emphasis on the object of sentence being to protect the society and deter the criminal, social impact of the crime and effect of sentence on social order are relevant considerations. At the same time, the Court has to keep in mind the rights of the victim of crime and society at large. Imposition of meagre sentence on account of lapse of time has been held to be not permissible. Such sympathy would be misplaced sympathy. Suffice it to observe that those grounds cannot be the basis to show leniency to the Appellant.

35. Accordingly, this Appeal is dismissed and the finding of guilt and order of sentence imposed by the Trial Court against the Appellant is affirmed.

A.M.KHANWILKAR, J.